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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 73 (RMB)

5 EVGENY BURYAKOV,

6 Defendant.

7 -----x
8 March 23, 2015
9 11:05 a.m.

10 Before:

11 HON. RICHARD BERMAN

12 District Judge

13 APPEARANCES

14 PREET BHARARA

United States Attorney for the
Southern District of New York

15 ADAM FEE

ANNA SKOTKO

16 Assistant United States Attorneys

17 LATHAM & WATKINS

Attorneys for Defendant

18 BENJAMIN NAFTALIS

19 IRINA SIVACHENKO

20 Also present: YANA AGOUREEV, Russian interpreter
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(Case called)

THE COURT: So the last time we were together for a conference we had, and we have today, a Russian language interpreter, but on standby I guess.

So, Mr. Buryakov, my understanding is that you understand everything we are saying. But if you don't and you want to turn to the interpreter, you're welcome to do that. OK?

THE DEFENDANT: Yes.

THE COURT: So a couple of items that I have, just really principally one and some scheduling issues.

Back on March 13 I received a fax in chambers from the government. There was no information on the fax transmittal about what they were transmitting, but enclosed with the fax was a document called protective order pertaining to unclassified information, and it had the signature of one of the defense counsel on it. I guess I am being asked -- I understand that I would in the normal course -- to so order this protective order. But I thought it was worthwhile to have you here in court today so we could place on the record, first from the government, in summary detail what this is about and what you're looking for, and then I will turn to the defense, and just to make sure, Mr. Naftalis, that you have discussed this in detail with Mr. Buryakov and he is OK with it.

This order does not consider what we call classified

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1 information, it is specifically directed at unclassified
2 information, but let me hear from the government as to what it
3 is and what you would like me to do with it.

4 MR. FEE: Thank you, your Honor.

5 As your Honor mentioned, this is a proposed protective
6 order relating to unclassified discovery in this case. We had
7 mentioned at the initial appearance before your Honor that this
8 would be coming.

9 To give it some context, the protective order is
10 relatively limited. Under the terms of this order, the
11 defendant would receive all of the discovery in electronic form
12 for review at prison; he is at the MCC right across the street.
13 And, of course, defense counsel will receive all the discovery
14 in electronic form. And for those things that can be produced
15 in hard copy, they are free under this order to print them out
16 in hard copy.

17 What the protective order principally does, and I will
18 briefly explain the cause, the reason why we are seeking this
19 from the government's perspective after this, it principally
20 limits it in two ways, the discovery. Number one, it restricts
21 what the defense can do in terms of distributing discovery to
22 anyone outside of the defense team, meaning counsel and others
23 assisting them and obviously the defendant.

24 THE COURT: It also limits the defendant in that
25 regard as well.

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1 MR. FEE: It does, of course. And all of its
2 protections or restrictions apply to counsel and the defendant
3 or any other member of the defense team.

4 The second meaningful restriction is it takes a
5 portion of the discovery and essentially provides that hard
6 copies of that portion of the discovery cannot be provided in
7 hard copy to the defendant within the prison. It makes a
8 distinction between parts of the discovery in this case,
9 meaning there are some things under this order he would not be
10 permitted to have hard copies of; there are some things he
11 could have hard copies of. We have agreed with the defense to
12 give them notice, via discovery production letter, of what
13 those things are.

14 I can say in the initial production of discovery in
15 this case, there are really two things that this order would
16 limit the defendant's ability to obtain hard copies of in the
17 prison. It is search warrant affidavits in this case, as well
18 as the transcripts of certain audio recordings relating to
19 co-conspirators of the defendant. And to be clear, he will
20 have all of that in electronic form, just not hard copy.

21 The good cause here, in general terms, is there are
22 sensitive materials in this case -- conversations involving
23 what the government believes are foreign intelligence agents
24 operating in New York City in the search warrant affidavits and
25 in other materials; there are discussions by an FBI agent about

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1 some of the techniques used by the FBI to uncover the
2 activities of these agents; and, of course, the content of the
3 conversations themselves is sensitive in that it talks about
4 what these foreign agents are doing here in the United States.

5 For that reason, your Honor, we are seeking a
6 protective order. We are seeking those specific but limited
7 restrictions on the hard copies simply because if hard copies
8 of those materials are introduced into the prison facility,
9 even if it were something other than the defendant himself
10 wishing to sort of put them in the stream, they can be taken,
11 they can be removed from his cell, they can be removed from the
12 prison library by others, even by accident or the malfeasance
13 of someone other than the defendant, and at that point they are
14 in the stream of information and certainly beyond our control.

15 THE COURT: To be sure, and you said this before, he
16 gets to see them whether they are electronic or hard copy; it's
17 not as if you're trying to keep any of this information from
18 Mr. Buryakov or his counsel.

19 MR. FEE: Correct, your Honor. He gets everything.

20 I should say most of the discovery, in relative terms
21 nearly all of it, is in a form that couldn't even be reproduced
22 in hard copy -- video surveillance, audio recordings; pictures
23 which could be printed, but most of it is not in that category.

24 Thank you, your Honor.

25 THE COURT: Mr. Naftalis, the fax that I referred to

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1 before came to chambers and it was dated -- signed, first of
2 all, by Marja Barton?

3 MR. NAFTALIS: I think it's actually my signature.

4 THE COURT: That's your signature, Benjamin Naftalis,
5 and dated March 13, 2015. Is that right?

6 MR. NAFTALIS: Yes. I think the government
7 transmitted it to you, but that is my signature and date.

8 THE COURT: It says that you agreed and consent to
9 this protective order. I want to make sure that you conferred
10 with Mr. Buryakov before you signed it and went over it with
11 him so he understands what it says.

12 MR. NAFTALIS: Yes, your Honor. My colleague and I
13 have met with Mr. Buryakov about the protective order. We have
14 reviewed the limitations that would be placed on his review, or
15 actually his access to certain hard copy materials, though they
16 will be on the electronic hard drive, and we are comfortable
17 with that.

18 One request I would make now -- I had raised with the
19 government before -- is because most of the materials in this
20 case are on a hard drive, I am foreseeing that there is going
21 to be an issue with his being able to review it in a timely way
22 given the limited number of hours at the library.

23 THE COURT: The limited number of hours that they can
24 use computers?

25 MR. NAFTALIS: Exactly. And since he, unlike most

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1 everyone else there, can't bring stuff back to his cell, we
2 would ask that he be given additional time at the library so he
3 can review it in a proper fashion.

4 THE COURT: I am going to leave that for the moment to
5 you and Mr. Fee, and Adam Johnson, I guess, or whomever to work
6 that out. Those are the kinds of things that usually counsel,
7 working with counsel for the BOP, can work out. Then if it
8 doesn't work out, you will let me know.

9 MR. NAFTALIS: I am just flagging it for you. I have
10 talked to the government about it.

11 THE COURT: Mr. Buryakov, you have been over this
12 protective order with Mr. Naftalis, is that right?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: And he signed it, but you agree to its
15 terms and conditions as well?

16 THE DEFENDANT: Yes, I do.

17 THE COURT: Thank you very much.

18 It does not need to be signed by the government
19 because it's presented by the government, is that right?

20 MR. FEE: Correct, your Honor.

21 THE COURT: But you would sign it also.

22 MR. FEE: By its terms, parts of it are binding by the
23 government.

24 THE COURT: We might add a signature line here today.

25 MR. FEE: If you would like, I am happy to sign it on

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1 behalf of the government.

2 THE COURT: So much for that.

3 So I have two other issues. One is, I meant to ask
4 the last time and I didn't, Mr. Buryakov is charged in part in
5 a conspiracy, right? Is it correct to understand that some
6 members or alleged members of that conspiracy have left the
7 country and are not subject to this criminal proceeding; is
8 that your understanding?

9 MR. FEE: Your Honor, it would be safe to say in this
10 proceeding that the other two named defendants in this
11 indictment are at large. I do not expect to have any imminent
12 presentments of those two defendants at this time.

13 THE COURT: Are those ones who enjoy immunity of some
14 sort?

15 MR. FEE: It gets a bit complicated. When they were
16 in the United States, my understanding is they did enjoy or
17 benefit from a form of diplomatic immunity. Were they to be
18 outside of the United States, again, my understanding is that
19 if they were outside of the United States and did not have any
20 official status here, they would not benefit from it.

21 THE COURT: Then the other issue is this. We have on
22 the calendar, I believe, a conference scheduled for later this
23 week. Do we need to have that conference or should we adjourn
24 that further for a longer time? It's up to you.

25 MR. FEE: Your Honor, I will speak only for the

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1 government. I expect you will hear the same from Mr. Naftalis.
2 I would ask the Court to adjourn that for this reason, your
3 Honor. We had hoped to resolve the protective order, we the
4 parties, much sooner, but because it is only just being
5 resolved, they do not yet have the discovery. Again, as soon
6 as it is signed, I am turning it over, but I imagine they will
7 need some additional time to review it.

8 THE COURT: So, Mr. Naftalis, what is a reasonable
9 amount of time that you would like to have? I am going to ask
10 Mr. Fee to sign and then I will sign. I can do it right here
11 in the courtroom when we finish.

12 MR. NAFTALIS: We would propose about 45 days to come
13 back, if that's convenient with the Court.

14 THE COURT: How is May 12 for all of you?

15 MR. FEE: It's fine for the government.

16 THE COURT: Let's say at noon if you don't mind.

17 Mr. Naftalis, am I correct we will call that a status
18 conference?

19 MR. NAFTALIS: Yes, your Honor.

20 THE COURT: We will vacate the conference that's
21 scheduled I think for this Thursday in favor of one on May 12,
22 2015.

23 Is there an issue of speedy trial or an application in
24 that regard?

25 MR. FEE: There is an application, your Honor. Before

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1 I get to that application, there is one other discovery issue,
2 which I am sure the Court is expecting to hear about soon,
3 classified discovery.

4 THE COURT: This order specifically says that it does
5 not cover classified information, so-called CIPA information,
6 is that right?

7 MR. FEE: Correct, your Honor. We are going to
8 forward to the Court as soon as we can -- I will say we have
9 not yet provided to defense -- a protective order along
10 probably similar lines relating to classified information.

11 With respect to the first disclosure -- there is
12 classified discovery in this case -- I would ask for two weeks
13 from today to produce that initial round of classified
14 discovery, which I expect will be the large majority of the
15 classified discovery in this case.

16 THE COURT: When is the protective order likely to be
17 submitted?

18 MR. FEE: I would hope to get it to you by the end of
19 the week.

20 THE COURT: End of this week?

21 MR. FEE: The end of this week. One of the issues
22 that remains, although I expect this will be resolved quite
23 quickly, with respect to Mr. Naftalis, his clearance. I
24 believe he has jumped through all the hurdles, not
25 surprisingly, but there are a few -- there's rumors, your

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1 Honor. So once he is cleared, we can hand it over immediately
2 after that.

3 THE COURT: It would be helpful, if it comes by letter
4 or by fax, that there be a brief explanation that this is the
5 proposed classified protective order that we discussed on March
6 23, etc., etc.

7 MR. FEE: We did not do it with the first one, and I
8 apologize for that. We will include a letter outlining what we
9 believe is good cause for the entry of the order and, if we are
10 able to, representing the defendant's position and whether it
11 has been discussed with the client.

12 THE COURT: That's always helpful.

13 Did you ask for a waiver of speedy trial?

14 MR. FEE: I did not, but at this time I would ask that
15 time be excluded under the Speedy Trial Act in the interest of
16 justice between now and the next conference on May 12, 2015,
17 principally for the defendant to obtain, receive and review
18 discovery in this matter and consider any potential motions
19 they might file.

20 MR. NAFTALIS: No objection.

21 THE COURT: I am going to find under 18, United States
22 Code, Section 3161 that the request for adjournment, joined in
23 by both sides, to and including May 12, 2015, at noon, is
24 appropriate and warrants exclusion of the adjourned time from
25 speedy trial calculations. I further find that the exclusion

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1 is designed to prevent any possible miscarriage of justice, to
2 facilitate these proceedings, including the discovery process,
3 and to guarantee effective representation of and preparation by
4 counsel for both parties, that is to say the defense and the
5 government, and, thus, the need for exclusion and the ends of
6 justice outweigh the interest of the public and the defendant
7 in a speedy trial pursuant to 18, United States Code, Section
8 3161(h)(7)(A) and (B).

9 So I see that Mr. Fee has already signed and dated
10 this protective order, and the record should reflect that I am
11 doing so at this point in time and dating it March 23, 2015.

12 Anybody have anything else they want to raise?

13 MR. FEE: Not from the government.

14 MR. NAFTALIS: No, your Honor. Thank you.

15 THE COURT: Nice to see you all.

16 If you all want to wait around for a copy of this, we
17 will make one for you.

18 MR. FEE: Thank you very much.

19 (Adjourned)
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